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# Is *MacPherson* A Legacy of Civilian Views?

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**Abstract:** *MacPherson* liberated the common law of negligence in the United States from its traditional constraints and helped better protect victims of defective products regardless of privity of contract. It made its way to other common law jurisdictions—United Kingdom and Australia—where the same result was achieved. *MacPherson*, however, never made its way to the civil law world—France and Germany—because these jurisdictions did not need it, given that privity of contract was never an obstacle there. The courts upheld products liability suits in the late nineteenth century on the basis of presumed negligence or even strict liability, thus going even beyond what *MacPherson* achieved.

**Keywords:** products liability, privity of contract, negligence, strict liability, contractual liability, defective product

## 1 Introduction

A century after Judge Cardozo's pronouncement in *MacPherson v. Buick*,[1] U.S. courts still follow its rule, and the legacy of this seminal decision endures. In his 1921 lecture series, Judge Cardozo suggested that courts should not stick to precedents that contradict a changed sense of justice or social welfare.[2] Whether changes of that nature occurred or not, the *MacPherson* rule is still complied with. By abolishing the doctrine of privity of contract, 1916 *MacPherson* has stood the test of time in the United States. Even more, its influence has extended throughout the common law world.

**1** 111 N.E. 1050 (N.Y. 1916).

**2** *See* Benjamin N. Cardozo, The Nature of the Judicial Process 150 (1921) ("[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.").

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This influence however did not go beyond. As privity of contract never came to existence in civil law jurisdictions, *MacPherson* was of no use there. As lawsuits started to come up, German and French law, for example, immediately offered victims of a defective product a remedy based on the manufacturer's negligence, which courts were willing to presume—thereby effectively giving victims the benefit of strict liability regimes. At no point in time was there a need to get rid of the contract shield that *Winterbottom v. Wright*[3] had imposed in the common law world at the beginning of the nineteenth century.

We will leave it to others to explain why the common law remained attached to its reductive approach to negligence and its nominate torts for so long.[4] It is worth noting, however, that even late nineteenth century German law, quite friendly to entrepreneurs' interests, provided a tort remedy to victims of defective products regardless of a contractual relationship with the manufacturer. A landmark decision by the *Reichsgericht* in 1915 made that conception very clear.[5] As Judge Cardozo was a voracious reader of all sorts of European scholarship, it is in fact quite possible that he was aware of this decision and that he found there some inspiration. It would be quite interesting to find evidence to confirm this influence, but so far we have not found any.

In an effort to assess the place of *MacPherson* beyond the United States, this article does not intend to take part in the discussion about the kind of duty of care that *MacPherson* gave rise to—whether universal, as the prevailing view sees it[6] or instead essentially relational, as Goldberg and Zipurski argue.[7] Instead, considering the

**3** (1842) 152 Eng. Rep. 402.

**4** *See* Fiedrich Kessler, *Products Liability*, 76 Yale L.J. 887, 889 (1967); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 937, 959–61 (1981).

**5** *See* Reichsgericht [RG] [Supreme Court] Feb. 25, 1915, 87 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 1 (Ger.).

**6** *See* William L. Prosser, Handbook of the Law of Torts § 83, at 680 (1941) (explaining that MacPherson led to the extension of a duty of care to "anyone who may reasonably be expected in the vicinity of the chattel's probable use and to be endangered if it is defective."); Rabin, *supra* note 4, at 937 & 932–33 n.28 (asserting that *MacPherson* was the starting point for the development of a general (or universal) duty of care).

**7** *See* John C.P. Goldberg & Benjamin C. Zipursky, *Moral of MacPherson*, 146 U. Pa. L. Rev. 1733, 1744 (1998) (arguing that *MacPherson*, in addition to two other aspects, "conceive[s] of duty as relational, that is, as owed by specific defendants or classes of defendants to specific plaintiffs or classes of plaintiffs, rather than by each individual to the world at large."); John C.P. Goldberg & Benjamin C. Zipursky, *The Myths of MacPherson*, 9 J. Tort L. (forthcoming 2016) (explaining, as the *Moral of MacPherson* does, that the duty is relational). The difference between this conception and the prevailing one, *supra* note 6, parallels the opposition between Judge Cardozo's (indeed, relational) and Judge Andrews' (universal) conception in *Paslgraf v. Long Island R.R. Co.* For an interesting comparison of this opposition, see Shauna Van Praagh,

socio-economic and judicial context, in Part 2 it chooses to focus on how the *MacPherson* opinion allowed the field of products liability law to develop after it prompted the abandonment of privity of contract and provided for the availability of negligence to third parties. Part 3 then describes the influence of *MacPherson* on foreign law and shows how *MacPherson* traveled to the United Kingdom and Australia. It also shows why *MacPherson* was of no use in the civil law jurisdictions where privity of contract had never seen the light of day. Based on this, Part 4 offers a brief outline of what a comparative analysis of the different laws presented in this article could explore.

## 2 MacPherson v. Buick Motor Co.

Prior to the *MacPherson* decision, a plaintiff injured by a defective product could only sue the manufacturer for negligence if she was in privity of contract with the manufacturer.[8] It is true that this limitation did not hold for all products. For imminently dangerous ones, courts had recognized a duty of the manufacturers to protect strangers' physical integrity.[9] Under this exception, the manufacturer of an imminently dangerous product could be held liable, on the ground of negligence, for injury caused by the product, regardless of who the victim was.[10] For the rest, however, the privity of contract doctrine remained intact for over eighty years. The following analysis, first, will provide a brief sketch of the law before *MacPherson* (2.1) and secondly, analyze how, under the pressure of industrialization and mass production, the New York Court of Appeals decided to change it (2.2).

### 2.1 The insulation of manufacturers from liability before *MacPherson*

Before 1916, manufacturers in the United States were essentially insulated from liability vis-à-vis victims of their defective products. The same was true in all

*Palsgraf as 'Transsystemic' Tort Law*, 6 J. Comp. L. 243 (2012). In turn, this difference also reminds one of the duty of care as defined by German law as opposed to French law, which espouses a broad general conception of care. *See* Franz Werro, La Responsabilité Civile 95, 2d ed. 106 (2011).

**8** *See* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (holding that persons injured by negligently made products or negligently provided services could not recover for those injuries if they were not the immediate purchaser of the product or service).

**9** *See* Thomas v. Winchester, 6 N.Y. 397 (1852) (adopting a first exception to the privity of contract rule—the imminently dangerous product exception.).

**10** *See id.* at 409–10.

other common law jurisdictions. In theory, this insulation did not extend to contractual partners, but in effect the reality was different. Although manufacturers were contractually liable to retailers for the defectiveness of their products, the latter had no incentive to sue unless sued by an injured plaintiff buyer or physically harmed themselves,[11] which was unlikely to occur because in most cases they sold the products and did not use them.[12]

This liability shield was only put into question where retailers could bring an action for indemnity against a manufacturer. This was the case, for example, in Iowa.[13] Even then, however, the court emphasized that the manufacturer could contest the validity of the judgment obtained by the victim against the retailer if it was not given notice of the previous case—evidencing once more the barrier to recovery from manufacturers of defective products.[14] This clearly favored their interests as industrialization and mass production were growing. Manufacturers enjoyed the vacuum of the law to innovate without much risk of liability.

Manufacturers, however, were not the only beneficiaries of this rule. Judges benefitted as well. In an era of mass production, it insulated courts from the potentially vast amount of "relatively unmanageable defect claims."[15] The privity of contract rule offered a way to keep the floodgates shut and the doors open to the market.[16] However, by the late nineteenth century the negative impact of the losses of victims of defective products had outgrown the benefits of the rule, and pressures to replace it had been building.[17]

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**11** *See* Pfarr v. Standard Oil Co., 146 N.W. 851 (Iowa 1914) (retailer brought indemnity suit against oil manufacturer after being sued by victim-consumer); Pullman Co. v. Cincinnati, N.O. & T.P.R.C.O, 144 S.W. 385 (railroad company brought indemnity suit against train car manufacturer after being sued by victim-employee); Bos. Woven-Hose & Rubber Co. v. Kendall, 59 N. E. 657 (1901) (plaintiff brought indemnity suit against boiler manufacturer after being sued by victim-employees).

**12** *See Thomas*, 6 N.Y. at 409 (noting that an injury is much more likely to fall on a remote purchaser than on the retailer).

**13** *See* Pfarr v. Standard Oil Co., 146 N.W. at 855–56 (stating that a retailer, in a suit for indemnity, could recover from a manufacturer that distributed statutorily noncompliant oil, which was sold to the ultimate consumer and subsequently exploded when being used).

**14** *See id.*

**15** Robert L. Rabin & Stephen D. Sugarman, Torts Stories 52 (2003).

**16** *See id.*at 52, 59.

**17** *See* John F. Witt, Ives *and* MacPherson*: Judicial Process in the Regulatory State*, 9 J. Tort L. (forthcoming 2016) (explaining the context in New York that made it ripe for the court to abandon privity of contract); Rabin & Sugarman, *supra* note 15; Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 Am. L. Reg. 209, 355 (1905) ("To encourage commerce and industry by removing all duty and incentive to protect the public is to invite

By 1916, the time for such change was ripe, and the New York Court of Appeals addressed the privity of contract rule issue in *MacPherson*. It did so for a number of reasons: the privity of contract rule had come to be seen as unacceptable politically, the Appellate Division had reversed and remanded *MacPherson* four years before, and Buick's appeal was limited to privity and negligence issues.[18]

## 2.2 The making of *MacPherson*

By the time the case reached the Court of Appeals after a complex procedural history,[19] the Court was able to deal merely with the question of whether Buick "owed a duty of care and vigilance to any one but the immediate purchaser."[20]

In reviewing this question, Judge Cardozo first described the facts of the case in a simple and clear manner[21]:

> The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car, it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted.[22]

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wholesale sacrifice of individual rights on the altar of commercial greed.... [I]t cannot be to the interest of any community to encourage carelessness and disregard of human life and property therein.").

**18** *See* Rabin & Sugarman, *supra* note 15.

**19** Mr. MacPherson first brought his case to court in 1910, where it was dismissed based on the lack of privity. He then appealed, winning a reversal and remand of the case in 1912. *See* MacPherson v. Buick Motor Co., 138 N.Y.S. 224 (App. Div. 1912). On remand, the second trial court rendered a judgment in favor of Mr. MacPherson, and Buick appealed on the ground that its duty of care only extended to those in privity of contract with it, and it had not breached that duty. *See* Rabin & Sugarman, *supra* note 15, at 48. On appeal for a second time, the Appellate Division affirmed the verdict and judgment for Mr. MacPherson in 1914. *See* MacPherson v. Buick Motor Co., 145 N.Y.S. 462 (App. Div. 1914). Then, Buick appealed again based on the same grounds as its previous appeal.

**20** MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916).

**21** Some have argued that the actual, legally relevant facts are not as simple and clear as Judge Cardozo set them out to be in his opinion. For example, they argue that Judge Cardozo's recitation of the facts might lead the reader to assume that the car was new (but he bought it new over one year before the accident) and that the collapse of the wheel took place during a routine drive (but he was rushing to take his friend to the hospital). *See* Rabin & Sugarman, *supra* note 15, at 42, 50–52. For the purposes of this article, we assume the facts are accurately stated by the Court of Appeals.

**22** *MacPherson*, 111 N.E. at 1051.

With this clear and simple recitation of the facts, it appeared that the only bar to recovery was what might seem to be an unjust and arbitrary privity of contract rule.[23]

At this point, the Court of Appeals had to attempt to fit these simple facts into the "imminently dangerous" exception as the law stood before *MacPherson* or to expand the exception. Judge Cardozo chose the latter; and it was by expanding the "imminently dangerous" exception that the Court of Appeals managed to extinguish the privity of contract requirement. Indeed, the Court of Appeals held that:

> If the nature of a thing is such that it is reasonably certain to place and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. … There must be knowledge of a danger, not merely possible, but probable.[24]

Although Judge Cardozo made this shift in the law seem natural, Chief Judge Bartlett sought to demonstrate in his dissent that this move was not in line with the precedents.[25]

To justify his move, Judge Cardozo considered both New York[26] and English precedents.[27] First, Judge Cardozo treated *Thomas v. Winchester* as establishing "the foundations of this branch of law," and adopting an exception to the privity of contract requirement for things that were inherently or imminently dangerous, whether or not because negligently made.[28] Notwithstanding the *Thomas* court's insistence on this very distinction,[29] Judge Cardozo considered that the principle

**23** *See* Rabin & Sugarman, *supra* note 15, at 51.

**24** *MacPherson*, 111 N.E. at 1053.

**25** *See id.* at 1055–57 (discussing, among other cases, Winterbottom v. Wright, (1842) 152 Eng. Rep. 402; Thomas v. Winchester, 6 N.Y. 397 (1852); Torgeson v. Schultz, 192 N.Y. 156 (1908); and Statler v. Ray Mfg. Co., 195 N.Y. 478 (1909)).

**26** *See id.* at 1051–1052 (discussing Thomas v. Winchester, 6 N.Y. 397 (1852); Loop v. Litchfield, 42 N.Y. 351 (1870); Losee v. Clute, 51 N.Y. 494 (1873); Devlin v. Smith, 89 N.Y. 470 (1882); and Statler v. Ray Mfg. Co., 195 N.Y. 478 (1909)).

**27** *See id.* at 1052–54 (discussing Heaven v. Pender, (1883) 11 Q.B.D. 503 (UK)); Walter Probert, *Applied Jurisprudence: A Case Study of Interpretive Reasoning in* MacPherson v. Buick *and Its Precedents*, 21 U.C. Davis L. Rev. 789, 789 (1987–88).

**28** *See MacPherson*, 111 N.E. at 1051 (referring to the tort of negligence).

**29** *See* 6 N.Y. at 408–09 (distinguishing between things that are inherently or imminently dangerous in their regular use (e.g., poisonous drugs) and things that may become imminently dangerous only if negligently made (e.g., a wagon)).

of the case was more important than the examples used to illustrate it.[30] He did so after analyzing the illustrations provided in the *Thomas* decision, including that of a defective wagon, which the court had considered not to be imminently dangerous.[31] To overcome the easy analogy between wagons and automobiles, Judge Cardozo remarked that "[t]he principle that the danger must be imminent does not change, ...[even if] the things subject to the principle do change."[32]

After discussing *Thomas*, Judge Cardozo turned to other New York precedents—*Devlin v. Smith*[33] and *Statler v. Ray Manufacturing Company*[34]—in which the courts respectively had found that a scaffold and a coffee-urn were imminently dangerous. According to Judge Cardozo, both cases "may [...] have extended the rule of *Thomas v. Winchester*" and "[i]f so, [the] court [was] committed to the extension."[35] Essentially, these courts had held that things whose regular function is to injure or destroy, as well as things whose normal function is for everyday use could classify as inherently or imminently dangerous.[36] By introducing this inconsistent application of the exception, Judge Cardozo, it seems, was left with no other choice than to bring coherence and clarity to the law with an expansion of the exception.

As further support, Judge Cardozo, then, examined yet again English law in *Heaven v. Pender*.[37] In his examination of the test and standards enunciated in the dictum of *Pender*, he extracted the underlying principles for his own holding, even though he stated that "[i]t may not be an accurate exposition of the

**30** *See* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 515 (1948).

**31** *See id.* at 511; 6 N.Y. at 408–09.

**32** *MacPherson*, 111 N.E. at 1053.

**33** *See* 89 N.Y. at 478.

**34** *See* 195 N.Y. at 480.

**35** *MacPherson*, 111 N.E. at 1052.

**36** *See id.* at 1052 (citing first Devlin v. Smith, 89 N.Y. 470 (1882); then citing Statler v. Ray Mfg. Co., 195 N.Y. 478 (1909); and then citing Torgeson v. Schultz, 192 N.Y. 156 (1908)).

**37** (1883) 11 Q.B.D. 503 (UK). Plaintiff, who had no contract with defendant, was injured while repainting ship docked at defendant's dry dock. Defendant erected staging to support the ship, which collapsed because of defective ropes holding stage. The court held for the plaintiff and suggested in dicta:

> [W]henever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing.

*Id.* at 510.

law of England" and that it may even need qualifications in New York.[38] With this final step in his analysis, Judge Cardozo closed the full circle of precedents and converted what may have been classified as latently dangerous in *Thomas* into imminently or inherently dangerous.[39]

*MacPherson* thus enlarged the category of dangerous things[40] and, at the same time, effectively disposed of the privity of contract requirement. At first, nevertheless, subsequent New York courts narrowly (mis)interpreted the doctrine of *MacPherson*.[41] For example, although the courts decided that a defective bottle[42] and a coffee urn[43] were dangerous things, another court dismissed a case involving a vehicle that had a defective door handle.[44] Given the flexibility of the *MacPherson* holding, however, it provided courts with discretion in deciding whether to require privity of contract or not. Over time, the exception appeared so broad that it became the obvious rule of liability, and in effect, the privity of contract rule disappeared.[45]

# 3 Influence on foreign products liability law

During a period of mass production, where many consumers were victims of defective products and many jurisdictions struggled with the consequences, *MacPherson* naturally served as an example of an adequate approach to provide victims with redress for manufacturers' wrongs. This exemplary role was useful in the common law world (3.1) It served no purpose in the civil law jurisdictions though, where courts did not have to overcome the doctrine of privity of contract and where manufacturers of defective products were held liable when negligent (3.2).

## 3.1 In the common law

Indeed, *MacPherson* explicitly influenced one of the most cited English decisions in tort law, *Donoghue v. Stevenson*.[46] It also travelled to Australia one year after

**38** *MacPherson*, 111 N.E. at 1053.
**39** *See* Levi, *supra* note 30, at 516; *supra* text accompanying note 30.
**40** *See* Levi, *supra* note 30, at 517.
**41** *See* Robert M. Davis, *A Re-examination of the Doctrine of* MacPherson v. Buick *and Its Application and Extension in the State of New York*, 24 Fordham L. Rev. 204, 205 (1955).
**42** *See* Smith v. Peerless Glass Co., 181 N.E. 576 (N.Y. 1932).
**43** *See* Hoenig v. Central Stamping Co., 6 N.E. 2d 415 (N.Y. 1936).
**44** *See* Cohen v. Brockway Motor Corp., 268 N.Y.S. 545 (App. Div. I934).
**45** *See* Levi, *supra* note 30, at 517–18.
**46** [1932] AC 562 (HL) (appeal taken from Scot.).

the *Donoghue* decision as evidenced in *Australian Knitting Mills Limited v. Grant*[47] and in Lord Evatt's letter to Lord Atkin.

### 3.1.1 In the United Kingdom

The influence of *MacPherson* on the law of the United Kingdom comes as no surprise, if we consider that the influence had flown in the other direction before. As the privity of contract requirement for tort actions in U.S. laws had begun with an English case—*Winterbottom v. Wright*, it was quite legitimate for Judge Cardozo to turn back to English law to support his move. As we saw, *Heaven v. Pender* planted the seeds for disposing of the privity of contract requirement, and it is in that precedent[48] that Judge Cardozo found the underlying principle that would support *MacPherson* in overruling *Winterbottom*. With the influence now flowing in the opposite direction, Lord Atkin and Lord Macmillan in *Donoghue* cited *MacPherson* for persuasive support.[49]

*Donoghue* was a 1932 Scottish case that became an English precedent after the House of Lords declared it was also establishing the law of England.[50] In this case, Ms. Donoghue had drunk from a ginger beer bottle bought by her friend.[51] She had found a decomposed snail in the liquid and claimed to have suffered physical and psychological damage as a result.[52] Ms. Donoghue, who had no contract with the seller of the ginger beer, asserted that the manufacturer had been negligent and that he should had a duty to keep such foreign bodies out of his products.[53] The manufacturer argued that even if he had been careless, he owed her no legal duty of care.[54] Ms. Donoghue won her claim.

The case has come to be celebrated as laying the groundwork for the modern U.K. tort of negligence; the first one to establish a general principle of negligence based liability.[55] Usually the applicability of a case as an authority is limited by its facts.[56] *Donoghue* is an exception to that rule. This is because Lord Atkin recognized that he was articulating a principle—the famous "neighbor principle":

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**47** *Austl Knitting Mills Ltd v Grant* (1933) 50 CLR 387 (Austl.).
**48** *See supra* text accompanying note 37. *Id.* at 509.
**49** *See* [1932] AC at 598–99, 617–18.
**50** *See* Geoffrey Samuel, Cases and Materials on Torts 113 (2006).
**51** *See* [1932] AC at 562.
**52** *See id.* at 562–53.
**53** *See id.* at 563.
**54** *See id.*
**55** *See* Samuel, *supra* note 50, at 113–14.
**56** *See id.*

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, is my neighbor? The answer seems to be—persons who are so closely and directly affected that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[57]

This principle was broad enough to extend its authority beyond the facts of *Donoghue*. As it was stated, the principle was applicable to any facts demonstrating physical damage to a person within the "neighbor" range of proximity.[58] The specific rule derived from this principle was that:

> [A] manufacturer of products, which he sells in such a form as to show that he intends for it to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.[59]

Similar to *MacPherson*, however, the rule pronounced by the House of Lords was not the obviously applicable rule.[60] In pronouncing his neighbor principle, Lord Atkin analyzed English cases and referenced *MacPherson*.[61] Unlike Judge Cardozo, Lord Atkin purported to not "seek a complete logical definition of the

**57** [1932] AC at 580.

**58** *See* Samuel, *supra* note 50, at 114.

**59** [1932] AC at 599.

**60** *See* Jörg Finsinger & Jürgen Simon, The Harmonisation of Product Liability Laws in Britain and Germany: An Applied Legal-economic Analysis, 99 (1992).

**61** Similar to Lord Atkin's reason for citing *MacPherson*, Lord Macmillan stated:

> In the American Courts the law has advanced considerably in the development of the principle exemplified in Thomas v. Winchester. In one of the latest cases in the United States, MacPherson v. Buick Motor Co., the plaintiff, who had purchased from a retailer a motor-car manufactured by the defendant company, was injured in consequence of a defect in the construction of the car, and was held entitled to recover damages from the manufacturer.
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> ....
>
> The prolonged discussion of English and American cases into which I have been led might well dispose your Lordships to think that I had forgotten that the present is a Scottish appeal which must be decided according to Scots law.... [But] I think it desirable to consider the matter from the point of view of the principles applicable to this branch of law which are admittedly common to both English and Scottish jurisprudence.

[1932] AC at 617–18.

general principle … common to all cases where liability is established."[62] Instead, Lord Atkin preferred identifying the "general conception of relations giving rise to a duty of care."[63] For Lord Atkin, the duty was limited by an analysis of proximity and reasonableness in the relation between plaintiff and defendant, whereas, according to the prevailing view, Judge Cardozo at least implicitly extended a universal duty of care limited by foreseeability.[64] Lord Atkin was interested especially in limiting "the range of complaints and the extent of their remedy."[65] Accordingly, he rejected the principle of *Pender* because he found it too broad and then pronounced the neighbor principle, which introduced the notion of proximity.[66]

He also analyzed other English precedents and towards the end of his opinion cited *MacPherson* for further persuasive support. Lord Atkin stated:

> It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in MacPherson v. Buick Motor Co.in the New York Court of Appeals, in which he states the principles of the law as I should desire to state them, and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the relation between manufacturer and the user of the car being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.[67]

**62** *Id*. at 580.

**63** *Id*.

**64** An application of either principle may have led to the same outcome, but Lord Atkin was not as convinced as Judge Cardozo that liability might extend to a car manufacturer in the United Kingdom under the same facts as *MacPherson* because it might be limited by proximity. *See* [1932] AC at 580, 598–99; Rabin, *supra* note 4, at 937 & 932–33 n.28; Richard A. Posner, Cardozo: A Study in Reputation 41 (1990). For a contrasting view of the scope of duty, see Goldberg & Zipurski, *supra* note 7.

**65** [1932] AC at 580.

**66** *See id*. at 580–81; Levi, *supra* note 30, at 518. This view shows that Judge Cardozo was even more generous than Lord Atkin in his conception of duty of care. *But cf*. Goldberg & Zipursky, *supra* note 7, at 1824 (arguing that, similar to Lord Atkin's neighbor principle, Judge Cardozo endorsed a conception of duty of care with a relational focus).

**67** [1932] AC at 598–99.

Interestingly, Lord Atkin used *MacPherson* in a similar way Judge Cardozo had used *Pender*. Lord Atkin indicated that *MacPherson's* statement of "the principles of the law [are] as I should desire to state them."[68] Although *MacPherson* had no authority in Scotland or England, Lord Atkin used *MacPherson* to demonstrate that if Judge Cardozo was able to extract the *MacPherson* principle from the "fundamental principles of the common law," then it would only be natural and logical for the *Donoghue* principle to be aligned with the *MacPherson* principle.[69] Therefore, allowing for the "neighbor principle" and the expansion of duty, regardless of the apparent deviation from the precedents. As Samuel points out, *Donoghue* liberated the English negligence liability from its historic entanglements and "established the tort as a general cause of action prima facie applicable, [...] within the neighbor range of 'proximity.'"[70]

Though *MacPherson* had no authority in England, English courts continued to reference it up till 1941.[71] There are two possible reasons for the continued citation of *MacPherson* even after *Donoghue*. First, English courts cited *MacPherson* because it provided the principles relied upon in and basis for the *Donoghue* decision.[72] When quoting the reasoning of the *Donoghue* rule, some English courts actually referenced the language Lord Macmillan quoted from *MacPherson*. Second, English courts may have also cited *MacPherson* because it provided additional persuasive support for the effective overruling of the almost hundred-year-old *Winterbottom*. Relatedly, English courts probably stopped mentioning *MacPherson* after 1941 because by that time, the *Donoghue* rule was strong enough to stand by itself, without having to reference the reasoning behind the rule.

### 3.1.2 In Australia

*MacPherson* further managed to travel all the way to Australia around 1933.[73] As is well known, English and Australian judges regularly exchanged commu-

**68** [1932] AC at 598.

**69** *Id.*

**70** Samuel, *supra* note 50, at 114. In light of Lord Atkins' neighbor principle, *Donoghue* suggests a relational duty—as conceived by Goldberg & Zipurzki, *supra* note 7—rather than a universal duty of care.

**71** Based on cases available through online databases.

**72** *See* John D. Gordan, III, *Publishing Robinson's Reports of Cases Argued and Determined In The High Court Of Admiralty*, 32 Law & Hist. Rev. 525, 569 (2014).

**73** *See Austl Knitting Mills Ltd v Grant* (1933) 50 CLR 387, 441 (citing MacPherson v. Buick Motor Co., 111 N.E. 1050).

nications in which they referenced cases.[74] More specifically, less than a year after the *Donoghue* decision, Justice Evatt wrote to Lord Atkin about *MacPherson* and *Donoghue*. In his letter he explained: "on all sides there is profound satisfaction that, in substance, your judgment and the opinion of Justice Cardozo of the U.S.A. coincide, and that the common law is again shown to be capable of meeting modern conditions of industrialisation, and of striking through forms of legal separateness to reality."[75] Not even six months later, Justice Evatt was mentioning both *MacPherson* and *Donoghue* in his *Grant v. Australian Knitting Mills Limited* dissent.[76]

In *Grant*, Mr. Grant brought an action for damages against the retailer and the manufacturer of underpants. Mr. Grant bought woolen underpants from a retailer that purchased the underwear directly from the manufacturer.[77] A short time after wearing the underwear, Mr. Grant got an irritation on the front part of his shins that developed "into an acute general dermatitis."[78] Mr. Grant "alleged that the garments contained a chemical substance introduced during the course of the manufacture of the material which formed an irritant when coming into contact with the skin and which was the cause of [his] condition."[79] Based on the alleged manner in which the chemical substance was added to the underpants, Mr. Grant's action against the manufacturer was for negligence in the making of the underpants.[80] The High Court of Australia held that the manufacturer was not liable, but Justice Evatt dissented.

In his dissent, Justice Evatt referenced *Donoghue* and *MacPherson*, although he primarily relied on *Donoghue*—or as Justice Evatt referred to it, the "*Snail Case*". The rule in Justice Evatt's dissent was basically his interpretation of the *Snail Case*. Justice Evatt extracted two factors to help determine whether a duty of care existed—proximity and "special relationship."[81] When discussing which types of objects were excluded from the duty of care, Justice Evatt then highlighted Lord Atkin's statement, which extended the duty of care beyond food and drinks.[82] As further support, Justice Evatt also cited *MacPherson*, explaining that "[t]he same principle has been applied even more generally in the United States," although it has been limited to manufacturers of the whole product and

**74** *See generally* Geoffrey Lewis, Lord Atkin (1983).
**75** *See id.* at 67.
**76** *See* 50 CLR at 439–41.
**77** *See* 50 CLR at 387.
**78** 50 CLR at 388.
**79** *Id.*
**80** *See id.*
**81** 50 CLR at 438–39.
**82** 50 CLR at 440–41.

not included the manufacturers of the components of the product.[83] Finally, in line with *MacPherson* and *Donoghue,* Justice Evatt concluded, "the defendant manufacturer was under a duty to take reasonable care in the preparation of the underclothing at its factory so as to avoid the retention in the garments of any chemical residuum likely to cause or set up injury or disease to the skin of the ultimate purchaser."[84] Mr. Grant lost, but he appealed to the Privy Council.

At the Privy Council, Mr. Grant and the principle of *Donoghue* and *MacPherson* were vindicated. The Privy Council applied *Donoghue* as the controlling case.[85] *Donoghue* was construed as pronouncing the rule stated by Lord Atkin after his discussion of *MacPherson*.[86] However, *MacPherson* was not cited in *Grant*.

Unlike English courts, Australian courts did see the value in continuing to cite *MacPherson*. Apparently, the reference to this case added historical and analytical value. For example, the High Court of Australia cited *MacPherson*, along with *Donoghue*, explaining:

> [*Winterbottom v. Wright*] was overthrown in the United States as a result of *MacPherson v Buick Motor Co*. and subsequently in England as a result of *Donoghue v Stevenson*. In that case, Lord Atkin said that Judge Cardozo in *MacPherson* had stated the principles of the law as his Lordship should desire to state them. They fixed upon reasonable foreseeability of injury if proper care were not taken. In that way, as Judge Cardozo put it, there was nothing anomalous in imposing upon A who contracted with B a duty to C; "foresight of the consequences involves the creation of a duty."[87]

Most recently, in 2013 the Supreme Court of Queensland cited *MacPherson* and *Donoghue* stating:

> The New York Court of Appeals' development of the law of negligence may be seen through a handful of cases. One of them, *MacPherson v Buick Motor Co*. was referred to in *Donoghue v Stevenson*, and relied upon by Lord Atkin. It decided that a duty of care is owed by the manufacturer of a motor car to the driver and passengers against the risk of physical damage.[88]

As one can see, the influence of *MacPherson* in Australia surpassed its influence in the United Kingdom. As we will show in the following section, however, things were quite different in continental Europe.

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**83** *See* 50 CLR at 441.

**84** 50 CLR at 440.

**85** *See* Grant v. Austl. Knitting Mills Ltd. [1936] AC 85 (PC) (appeal taken from Austl.).

**86** This was the specific rule derived from Lord Atkin's "neighbor principle." *See supra* Part 3.1.1.

**87** *Esanda Fin Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 300.

**88** *Tarangau Game Fishing Charters v Eagle Yachts* [2013] QSC 16, ¶ 81.

## 3.2 In the civil law

As already mentioned, neither statutes nor court decisions ever recognized the concept of privity of contract in the civil law world. To the contrary, article 1382 of the 1804 French Civil Code (CCfr) provided for a general duty of care.[89] Even the more restrictive formulation of section 823 of the German Civil Code (BGB) did not call into question that principle, at least with respect to material damage resulting from injuries to property or physical integrity.[90]

For a civil law jurist, it is therefore striking to learn of the privity of contract doctrine in the common law and the long lasting reluctance of this law to recognize a general tort of negligence. Unsurprisingly, *MacPherson* had no influence in the civil law jurisdictions. A brief sketch of German and French law at the time of this decision may help shed light on this statement.[91]

### 3.2.1 In Germany

Some German comparative law books mention *MacPherson* and analyze it, but never to indicate a possible influence on German tort law.[92] The reason for this lack of influence is quite simple. Negligence was always at the disposal of the victims of defective products in a lawsuit against a manufacturer.[93] Whether consumers brought such lawsuits during the nineteenth century in Germany, however, is another question. For all sorts of reasons, including economic and cultural ones, it is clear that they did not. Indeed, the first fundamental products

**89** *See* Code civil [C. civ] [Civil Code] art. 1382 (Fr.): "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*" [Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it.]. *Id.*, *translation at* https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

**90** *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.).

**91** The analysis here focuses on aspects relevant for the discussion of the *MacPherson* decision—it does not present a complete picture of products' liability law in Germany or France.

**92** *See* Gert Brüggemeier, Haftungsrecht: Struktur, Prinzipien, Schutzbereich 397–98 (2006) [hereinafter Brüggemeier, Haftungsrecht]; Gert Brüggemeier, Common Principles of Tort Law: A Pre-Statement of Law 112 n.578 (2004) [hereinafter Brüggemeier, Common Principles]. Instead, Brüggemeier explains that *MacPherson, Donoghue*, and *Brunnensalz*, Reichsgericht [RG] [Supreme Court] Feb. 25, 1915, 87 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 1 (Ger.), are all cases standing for the same proposition—manufacturers owe a duty of care to consumers and other third parties.

**93** *See e.g.*, 87 RGZ 1.

liability case in Germany is a 1915 case, known as the *Brunnensalz* case, where the *Reichsgericht* allowed the plaintiff's tort claim against a manufacturer.[94]

In this case, the plaintiff suffered internal injuries caused by splinters of glass in the medicine she bought in its original packaging from a pharmacist.[95] Confirming the novelty and the uncertainty of products liability cases, she sued the manufacturer on two counts: she brought a tort claim, asserting liability of the manufacturer for negligence in the manufacturing process, and she also brought a claim for damages based on a contract of warranty between her and the manufacturer.[96] In the alternative, she claimed that the pharmacist impliedly assigned his warranty claim against the manufacturer.[97] With no hesitation, the court quickly dismissed the claims under contract law[98] but allowed the tort claim. As a matter of course, the general principles of liability based on negligence, as provided for in the German Civil Code (sections 823 to 853 BGB), were applied, and the court found no reason to refer to mechanisms and rules of contractual liability.

More interestingly, the court also decided that since the plaintiff had established that the cause of the injury had occurred in the defendant's manufacturing plant, there was no need for her to prove how the glass splinters got into the bottle.[99] On this basis, the court went on to shift the full burden of proof to the manufacturer. It interpreted the section dealing with employer's liability (section 831 BGB) as requiring the manufacturer to prove that he had complied with his duties as an employer to carefully select, instruct, and supervise his employees in order to be exempted from liability to the ultimate consumer.[100] At the same time, the court established a high level of proof by determining that the manufacturer had to present evidence that showed compliance with the duty of "higher supervision."[101] In effect, the German *Reichsgericht* did decide in 1915 what the *Escola v. Coca-Cola Bottling Company of Fresno* court would hold in 1944.[102]

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**94** *See* Brüggemeier, Haftungsrecht, *supra* note 92, at 133 (citing 87 RGZ 1).

**95** *See* Kessler, *supra* note 4, at 914.

**96** *See id.*

**97** *See id.*

**98** Attached to a subjective theory of contracts, the *Reichsgericht* refused to find the required intention to warrant the purity of product based on the facts and was even less willing to find an implied intention to assign the warranty. *See* Kessler, *supra* note 4, at 914–15.

**99** *See id.*

**100** *See* Brüggemeier, Haftungsrecht, *supra* note 92, at 133; Brüggemeier, Common Principles, *supra* note 92, at 127.

**101** Common Principles, *supra* note 92, at 128 (citing Reichsgericht [RG] [Supreme Court] Feb. 25, 1915, 87 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 1, 4 (Ger.)).

**102** *See* Brüggemeier, Common Principles, *supra* note 92, at 128 ("The *Reichsgericht*... stated, 'The actual basis for application of § 831 *BGB* is present if established that the cause of the plaintiff's

As is shown by the *Brunnensalz* case, even if *MacPherson* would have traveled to Germany, it would have arrived one year too late and its holding would have been irrelevant to German products liability law. By 1915, the *Reichsgericht*'s judgment was almost thirty years ahead of products liability law in the United States, or at least in California with *Escola*.[103] It would therefore not be surprising to learn that the influence went instead from Germany to New York. Indeed, the *Brunnensalz* case presented facts that were instructive for the *MacPherson* case.[104]

As we indicated above, it is well known that Judge Cardozo was a voracious reader of all sorts of European literature, including German law books. In *The Nature of the Judicial Process* alone, Judge Cardozo cited ten German books and encyclopedias.[105] Even more, when discussing the gaps in law that judges fill, he conceded that "[m]any of the gaps have been filled in the development of the common law by borrowing from other systems."[106] It would be quite amusing to learn that he knew about the *Brunnensalz* case. In fact it is not only possible, but also quite likely! As we admitted, however, we have found no evidence of this knowledge.[107]

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injury was set in the defendant's factory.'"); Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (1944) (requiring defendant to produce "evidence to rebut the inference of negligence which arises upon the application of the doctrine of res ipsa loquitur....").

**103** *See* 150 P.2d at 440.

**104** As mentioned, the plaintiff asserted two contract claims and one tort claim, the former being quickly disposed of by the *Reichsgericht*. Mr. MacPherson, on the other hand, only brought a tort claim, but before *MacPherson*, contract law (that is, privity of contract) was applied to the analysis of negligence as a limitation on a manufacturer's duty. Therefore, Judge Cardozo, like the *Reichsgericht*, had to make a choice on whether the claim should be limited by contract law.

**105** Judge Cardozo cited the following: Lorenz Brütt, Die Kunst der Rechtsanwendung (1907); Eugen Ehrlich, Die juristische Logik (1918); Rudolf von Jhering, Zweck im Recht (1877); Eugen Ehrlich, Grundlegung der Soziologie des Rechts (1913); Rudolf Stammler, Richtiges Recht (1902); Gnaeus Flavius, Der Kampf um die Rechtswissenschaft (1906); Fritz Berolzheimer, System der Rechts und Wirtschaftsphilosophie (1905); Enzyklopädie, Bd. 1, D. 10; Rudolf Stammler, Die Lehre von dem richtigen Rechte (1902); and Ernst Zitelmann, Lücken im Recht (1902). *See* Cardozo, *supra* note 2, at 15, 70, 72, 101–02, 104, 107, 133, 137.

**106** *See id.* at 123.

**107** Time constraints coupled with the possibility that Judge Lehman may have burned in 1939 any correspondence shedding light on this matter led us to determine it was preferable not to review Judge Cardozo's correspondence prior to the writing of this article. *See* Richard Polenberg, The World of Benjamin Cardozo, 3–4 (1997) (stating that Judge Lehman—Judge Cardozo's closest friend to whom he bequeathed all of his books, letters, and personal papers—refused to turn over Judge Cardozo's correspondence to his first biographer because Judge Cardozo "guarded jealously his personal privacy" and instead burned all the letters and personal papers in 1939).

### 3.2.2 In France

Faithful to its revolutionary ideals of the end of the eighteenth century, French law was even more generous than German law to victims of defective products. Accordingly, there was no legal reason for *MacPherson* to exert an influence on French products liability law.

Indeed, as early as needed, French law provided victims of defective products with a tort claim based on negligence. In addition, courts gradually imposed strict liability on the basis of article 1384 CCfr, paragraph 1 of this provision states that "*[One is] responsible not only for the damage caused by [one's] own act, but also for that which is caused by the acts of persons for whom [one is] responsible, or by things that are in [one's] custody*."[108] For reasons that we will not discuss here, French law also provided victims of defective products with a direct contractual warranty claim against manufacturers (*action directe*) and later on imposed contractual strict liability against the seller derived from the *obligation de sécurité*.[109]

As early as 1896, cases were brought on the basis of article 1384 CCfr, which became the basis of a general principle of strict liability for things (*la responsabilité du fait des choses*). In the famous 1896 *Teffaine* case,[110] a widow of a crewmember brought an action against the owner of a boiler that exploded because of its defective engine. The *Cour de cassation* found for the plaintiff although the owner of the boiler was not proven to have been negligent. The proof of a hidden defect (*un vice occulte*) was enough to trigger the keepers' liability.[111] In effect, it held that there is an inherent presumption of liability for harm caused by things in article 1384 paragraph 1 CCfr, separate from liability under article 1382 CCfr.[112]

The 1930 *Jand'heur* decision took it even a step further. In this case, the victim hit by a delivery truck brought an action under article 1384 paragraph 1

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**108** C. civ. art. 1384(1), *translated in* Legifrance.gouv.fr, Legifrance translations (2006), https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (translated from: "*On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.*").

**109** *See* Duncan Fairgrieve, *L'exception française? The French Law of Product Liability*, *in* Product Liability in Comparative Perspective 84, 88 (Duncan Fairgrieve ed. 2005). In defining the *obligation de sécurité*, the *Cour de cassation* has explained, "the seller acting in his professional capacity must deliver products that are free from any defects likely to cause harm to people or goods." *Id.* (citing Cass civ 1, 20 March 1989, *Dalloz* 1989.581, note Malaurie).

**110** *See* Cour de cassation [Cass.] [supreme court for judicial matters] June 16, 1896, D.P. 1897, I, 433 (Fr.).

**111** *See* Geneviève Viney, Traité de droit civil: Les obligations: La responsabilité: Conditions 680 (1982).

**112** *See* Franz Werro, *Liability for Harm Caused by Things*, *in* Towards a European Civil Code 927 (Hondius et al. eds. 4th rev. ed. Kluwer L. Int'l 2011) (1994) (providing additional details about the evolution of the interpretation of article 1384 CCfr).

CCfr against the owner of the delivery truck. The plaintiff argued that the defendant had to be responsible for the daughter's loss regardless of fault, whereas the defendant contended that strict liability for things did not apply when operated by its custodian (*le gardien*). The court had to decide whether article 1384 CCfr would apply to cars because the accidents resulted from the act of a thing or whether fault-based liability, as provided in article 1382 CCfr, would apply because the driver was operating the car, thus obliging the victim to establish the driver's fault. Unanimously, the *Cour de cassation* decided that, as the custodian of the car, the driver was liable for the accident he caused, whether or not the accident could be attributed to the conduct of the car's custodian—thus regardless of that person's fault.[113] As André Tunc once remarked, a pyramid had been built on the bars of a pinhead.[114] Indeed, the text of article 1384 CCfr could have been read either way, but the court was well aware that the growing number of automobile accidents that came with the rapid expansion of the automobile industry required an adaptation of the law.[115]

Although the *Cour de cassation* interpreted article 1384 paragraph 1 CCfr as applying to injuries caused by automobiles, the provision governs all objects.[116] Incidentally, this decision played a subsequent role in the development of the law of neighboring countries, such as Belgium and Italy.[117] Clearly, this case law also helped victims of defective products. The courts were able to impose strict liability on manufacturers on the basis that they were the keepers of the structure of their products. Keepers were held responsible for any harm caused by the product; absence of fault was not a viable defense.[118] Accordingly, and similar to Germany, an influence of *MacPherson* on French products liability law was inconceivable.[119] The French products liability law was in 1896 what U.S. products liability law became in 1916 with *MacPherson*.

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**113** *See id.*; André Tunc, *Traffic Accident Compensation in France: The Present Law and A Controversial Proposal*, 79 Harv. L. Rev. 1409, 1411–12 (1966); Cour de cassation [Cass.] [supreme court for judicial matters] ch. réuns., Feb. 13, 1930, D.P. 1930 I 57, at 121–23 (Fr.).

**114** *See* André Tunc, *A Codified Law of Tort: The French Experience*, 39 La. L. Rev. 1051, 1074 (1979) (noting that the *Cour de cassation* built an entirely new law practically without any textual support).

**115** *See* Robert F. Taylor, No Fault Takes a French Twist: A French Re-Examination of the Nature of Liability, 9 Loy. L.A. Int'l & Comp. L. Rev. 545, 552–53 (1987).

**116** *See* Franz Werro & Erdem Büyüksagis, *The Bounds Between Negligence and Strict Liability*, *in* Comparative Tort Law: Global Perspectives 201, 212 (Mauro Bussani & Anthony J. Sebok eds. 2015).

**117** *See id.* at 213.

**118** *See* Tunc, *supra* note 113, at 1412.

**119** In fact, French law could have had an influence on Judge Cardozo's *MacPherson* decision. He was also a voracious reader of French law books. In *The Nature of the Judicial Process* alone, he cited six French law books: François Gény, Méthode d'interprétation et sources en droit privé positif (1919); Raymond Saleilles, De la personnalité juridique. Histoire et théorie: vingt-cinq leçons

# 4 A brief outline of a possible comparative analysis

As shown above, the direct and explicit influence of *MacPherson* was limited to the common law world. In civil law jurisdictions, the *MacPherson* opinion served no purpose, as the doctrine of privity of contract had never seen the light of day. Yet in each law described in this article, we saw that contract law played a role. In the common law prior to *MacPherson*, it was, as we saw, to dispose of the claims of victims of defective products against manufacturers with whom they had no contract. Under French law, as we briefly stated it, contract claims (*action directe* and *obligation de sécurité*), to the contrary, were a means of reinforcing the protection of such victims alongside with torts claims. Under German law, the role of contract was also raised. However, the *Reichsgericht* decided to leave aside contract claims possibly based on an assignment of rights to the victim, and they merely remained an unnecessary possibility for a plaintiff to justify a claim against a manufacturer.

While the exact role played by contract law in the development of products liability law is undoubtedly very interesting, we will not explore this question here, as it would go beyond the scope of this article. Instead, we would like to briefly outline two points, which should also be the object of further investigations: the parallel outcomes triggered by tort law with respect to the protection of the victims of defective products in the common law and in the civil law only after 1916 (4.1), and the divergent paths taken in the developments of tort law following WWII (4.2)

## 4.1 Parallel outcomes after 1916

On the basis of the present analysis, *MacPherson* appears to have stated a rule that parallels the one already in place in the civil law when it was decided. As we saw, the rule there was in the books at the very moment of the adoption of the French and German codes in 1804 and 1900 respectively. For obvious reasons, it was only with the development of mass production and industrialization that case law began to show the potential of that law. A little before

(1910); Léon Duguit, Les transformations générales du droit privé depuis le Code Napoléon (1912); Léon Michoud, La responsabilité de l'État à raison des fautes de ses agents (1895); Joseph Charmont, La renaissance du droit naturel (1910); Paul V. Eycken, Méthode positive de l'interprétation juridique (1907). *See* Cardozo, *supra* note 2, at 16–17, 19, 26, 46, 82, 112.

*MacPherson*, it did so very clearly in 1896 *Teffaine* in France and in 1915 *Brunnensalz* in Germany.

Whether *Teffaine* or *Brunnensalz* influenced Judge Cardozo or not may and will probably remain unrevealed.[120] What is certain is that the result achieved in Judge Cardozo's seminal decision forced New York law to accept what had been expressly recognized twenty years before in France and one year earlier in Germany. Thus, if we cannot present *MacPherson* as the legacy of civilian laws, we can certainly state that it replicates the outcome reached under these laws.

It is also worth noting once more that the rule established in *Brunnensalz* with respect to the presumption of fault was not recognized in the United States[121] before *Escola v. Coca-Cola Bottling Company of Fresno* in 1944. As we saw, the level of protection achieved by French case law in 1896 and by German case law in 1915 law did not make its way to the United States until almost the end of WWII. Remembering that *Donoghue* came up in England only until 1932, it would certainly be worth exploring the common law world's resistance to change. This resistance that affected victims of defective products, however, changed after the mid-forties.

These outlined parallel outcomes would justify a more detailed presentation. While concentrating on the law of products liability, such research could help shed more light on the grounds of liability in general. Indeed, it would be interesting to compare the different developments of the law of negligence and its relation to strict liability, as well as the role played by contract law in the common law[122] and the civil law.[123] The restrictive approach to the tort of negligence as well as the importance given to nominate torts in the common law in comparison to the approach in the civil law would be worth exploring and could help shed light on the different economic and philosophical differences that often exist between the two. A comparative study of the role of contract law with respect to that of tort would also help understand these differences.[124]

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**120** *See* Polenberg, *supra* note 107.

**121** Or at least in California. *See Escola*, 150 P.2d at 440.

**122** *See* Grant Gilmore, The Death of Contract 95, 102 (2d ed. 1995) (arguing that contract law is being reabsorbed into tort law and providing as one of the many examples, the demise of privity as a limitation on the scope of duty).

**123** For some preliminary work results on the different developments of strict liability, including the civil laws on the Continent and the law of the United Kingdom, see generally The Boundaries of Strict Liability in European Tort Law (Franz Werro & Vernon V. Palmer eds. 2004).

**124** For an account of the interaction between contract and tort law in England from the late eighteenth to the late twentieth centuries, see generally Patrick S. Atiyah, The Rise and Fall of Freedom of Contract (1979).

## 4.2 Contrasting developments after WWII

As is well known, the reality of products liability laws changed after WWII.[125] Dramatic developments took place in the United States until the late 1990s.[126] Before the Restatement (Third) of Torts slowed things down, thousands of cases were litigated to shape the exact entitlements of the victims of defective products and define the different types of defectiveness. Products liability became a subject in its own right that lawyers practiced and scholars specialized in.

The legal reality developed in a very different way in Europe. Indeed, the European Community decided in 1985 to adopt a Directive on Product Liability[127] modeled after the rules of Restatement (Second) of Torts.[128] However, even after its adoption, the importance of tort law as a means of compensating victims of defective products in Europe never came close to what it had become in the United States.[129] Early on, before the European Directive, products liability law in Europe left its preeminent place to the law of insurance. More specifically, the introduction of mandatory first party accident insurance schemes relegated the importance of tort law to less dramatic and more dispersed litigation between the first party insurer and the tortfeasor, leaving the victim that was often covered for the most part out of the litigation scene. In addition, Europeans tended to trust the state to pass regulations that defined safety requirements for a number of products.[130] Both the relative efficacy of these insurance schemes and the safety regulations again deflated the importance of tort law claims. Relatedly, U.S. procedural devices such as class actions or the contingent fee system were not implemented in Europe.[131]

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**125** *See* Mathias Reimann, *Product Liability*, *in* Comparative Tort Law: Global Perspectives 250, 251 (Mauro Bussani & Anthony J. Sebok eds. 2015).

**126** *See id.* at 252–53.

**127** Council Directive 85/374, 1985 O.J. (L 210) 29 (EC).

**128** *See* Reimann, *supra* note 125, at 252.

**129** On the development of products liability law in Europe, see generally Franz Werro & Eric Mitterreder, *Products Liability in the European Union: A Story of Unity or Plurality?*, *in* 2 European Private Law: A Handbook (Mauro Busanni & Franz Werro eds. 2014).

**130** *See* Council Directive 2001/95, 2001 O.J. (L 11) 4 (EC); Geraint G. Howells, *The Relationship Between Products Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 Washburn L.J. 305, 307 (2000); Christopher Hodges, *Approaches to Product Liability in the EU and Member States*, *in* Product Liability in Comparative Perspective 192, 195 (Duncan Fairgrieve ed. 2005).

**131** *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?* 62 Vand. L. Rev. 179, 198 (2009).

Again, it would go beyond the scope of this article to analyze these differences, but they certainly provide an interesting object of comparison for the respective role of tort law and products liability laws on both sides of the Atlantic. For example, in our opinion, it is clearly the case that unlike Americans, Europeans would not claim, in the same way, that lawsuits are good for them.[132] While legal services in Europe are also the object of a private market, they are an important part of the mission of the state. Whether future trade developments will allow these differences in culture and mentality to be preserved remains to be seen. Once again however, this is a story for another day.

## 5 Conclusion

The *MacPherson* decision liberated the common law of negligence in the United States from its traditional constraints, and it helped better protect the victims of defective products regardless of privity of contract. It made its way to other common law jurisdictions, such as the United Kingdom and Australia, where the same result was achieved.

*MacPherson*, however, never made its way to the civil law world. The reason is simple. Civil law jurisdictions did not need it, given that privity of contract had never seen the light of day there. As we showed, when products liability suits came up there in the late nineteenth century, the courts had no trouble upholding them on the basis of presumed negligence or even strict liability, thus going even beyond what *MacPherson* achieved. It is very probable that in 1916 Judge Cardozo knew of the recent case law in these countries, and hence quite possible that it played a role in shaping his opinion.

As suggested, it would be interesting to engage in a further comparative inquiry and to explore the question as to why the law developed the way it did on both sides of the Atlantic, before and after WWII. Indeed after the war, the common law—late in comparison to European developments—caught up and developed a sophisticated body of tort law. The Europeans took a different route, despite their adoption of the EC Directive on products liability in 1985, modeled after U.S. principles of the Restatement (Second) of Torts. Unlike the United States, Europe adopted insurance schemes and safety regulations that tended to

**132** *See generally* Carl T. Bogus, Why Lawsuits are Good for America: Disciplined Democracy, Big Business, and the Common Law (2001); *see also* Ralf Nader, *Suing for Justice: Your Lawsuits are Good for America*, Harper's Magazine, Apr. 2016, at 57.

reduce the importance of the law of tort, specifically in the area of products. Here too, it would be interesting to explore the differences of approach taken on both sides of the Atlantic. To do justice to the respective approaches, we would have to provide an account of the cultural and political differences that determine the law. Undoubtedly, the contrasting role played by the state in the two cultures also would be an important point to grasp.